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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. ~~289~~ 27.

J. W. ALLEN, Comptroller &c., *Plaintiff in Error,* *vs.* THE PULLMAN COMPANY, *Defendant in Error.*	In Error to the Circuit Court of the United States for the Middle District of Tennessee.

ARGUMENT FOR DEFENDANT IN ERROR.

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ARGUMENT FOR DEFENDANT IN ERROR.

This writ of error is brought to reverse the three judgments shown on pages 59 and 60 of the printed record. These judgments were recovered by the Pullman Company for taxes which the state of Tennessee forced it to pay.

The three cases involve different transactions and three distinct statutes of the state of Tennessee.

Defendant in error refused to pay these taxes and obtained from the federal court in Tennessee a final decree enjoining the Comptroller of Tennessee from attempting to collect them. That decree was reversed in this court

(139 U. S. 658), not on the merits, but because equity did not have jurisdiction of the subject matter.

Thereupon defendant in error paid the taxes under protest, brought the suits involved on this writ to recover back the taxes and obtained judgments therefor in the United States Circuit Court in Tennessee.

Action No. 2867 in the court below involved taxes for 1887 and 1888, imposed under the Tennessee tax act of 1887 which laid a tax of $500 on each car operated by a sleeping-car company. The amount involved and its items are shown by the record (pr. rec. 30) in the bill for taxes rendered by the state comptroller, and which was afterwards paid, and are as follows:

2 cars, Nashville and Memphis, 1887	$1000.00
Interest to date	264.16
Same for 1888	1000.00
Interest to date	204.16
2 cars, Nashville and Chattanooga, 1887	1000.00
Interest to date	264.16
Same for 1888	1000.00
Interest to date	204.16
One other car equivalent on business done on all interstate cars, 1887	500.00
Interest	132.08
Same for 1888	500.00
Interest	102.08
Total	6170.80

Action No. 2866 involved taxes for three years from April 8, 1889, to April 8, 1901, imposed under the Tennessee tax act of 1889, which laid a tax of $3,000 on each sleeping-car company. The amount, as appears from the said bill of the comptroller, is as follows:

April 8, 1889, to April 8, 1890, one year	$3000.00
Interest	428.50
April 8, 1890, to April 8, 1891, one year	3000.00
Interest	248.50
April 8, 1891, to April 8, 1892	3000.00
Interest	68.50
Total	9745.50

Action No. 2903 involved a tax for the year ending April 8, 1893, imposed under the Tennessee tax act of 1891, and as is shown by the said comptroller's bill (pr. rec. 32), was as follows:

April 8, 1892, to April 8, 1893.....$3,000

Interest on these sums to the date of the judgments, less a rebate hereinafter shown, brought them up to the amounts of the judgments.

I.

TAXES UNDER THE LAW OF 1887 FOR THE YEARS 1887 AND 1888.

These taxes were levied under the Tennessee general revenue act of 1887, which provided as follows:

"That the rate of taxation on the following *privileges* shall be as follows:

"Sleeping Cars--Each company doing business in the state on each car per annum, $500."

Section 8 of the same act is as follows:

"Be it further enacted, That any and all parties, firms or corporations exercising any of the foregoing privileges must pay the tax as set forth in this act for the exercise of such privilege, whether they make a business of it or not."

Allen, comptroller, issued his warrant on August 28,

1891, reciting that the Pullman Co. was liable under the section above quoted, for taxes for 1887 and 1888 on two sleeping cars running locally between Nashville and Memphis; on two cars running locally in the same years between Nashville and Chattanooga, and on one car for the same period, as the proportion due Tennessee on the interstate business on cars run through Tennessee, a total of $6170.80. Under that warrant the sheriff distrained upon a sleeping car in Nashville, and thereupon the Pullman Co. paid the taxes under protest. (pr. rec. 52.)

The business in which the Pullman Company was engaged and the manner in which it operated cars into and through Tennessee, and also certain cars which it is claimed were run entirely within Tennessee, is shown by the special finding of facts (pr. rec. 50 & 51), as well as by a stipulation in regard thereto, the contract under which they were operated (pr. rec. 22-28) and also by testimony (pr. rec. 32 to 42). There is no contradiction or dispute on these matters. And from these it clearly appears that during all of the time covered by these different suits the business of the Pullman Company was principally interstate business, and its business and the conduct of the same in Tennessee, were exactly the same as that shown in *Pickard* v. *Pullman Co.*, 117 U. S. 34, and *Pullman Co.* v. *Nolan*, 22 Fed. Rep. 276, which were there held to constitute interstate commerce.

In addition to the facts appearing in the opinions of the last two cases, the findings, stipulation and depositions referred to show that certain cars of plaintiff were run as follows: A car left Memphis in the evening and ran to Nashville, arriving there in the morning. It left Nashville the following evening, passed through Chattanooga and arrived

in Atlanta, Georgia, the following morning. The following evening it left Atlanta on its return trip, passed through Chattanooga and reached Nashville the following morning. It then left Nashville on the evening of the same day, and completed its trip by arriving at Memphis the following morning. There were no cars whose run was only between Nashville and Chattanooga. The only cars passing through Chattanooga continued on their way to Atlanta, Georgia.

Even if, however, there had been cars running only between Nashville and Chattanooga, those cars would have run interstate, as the railroad passes into both Alabama and Georgia in going to Chattanooga. *Hanley* v. *Kansas City S. R. Co.*, 23 U. S. Supreme Ct. Rep., 214. There are several stations on that line of road in Georgia.

Four cars were required to fill these lines between Memphis and Atlanta. The same cars were not used continuously in this service, but were changed from time to time by defendant in error. On trips from Memphis to Nashville, tickets were sold to Nashville and intermediate points, but no further. On trips from Nashville to Memphis, tickets were sold to Memphis and intermediate points, but no further. On trips from Atlanta to Nashville, tickets were sold from Atlanta to Nashville and all intermediate points, including Chattanooga. On trips from Nashville to Atlanta, tickets were sold to Atlanta and all intermediate points, including Chattanooga.

From 1887 to the present time the Pullman Co. has operated sleeping cars on most of the principal railroads of Tennessee. Such sleeping cars have all been operated under contracts between it and the several railroad companies similar to the contract shown in this cause. On those railroads the cars have been run into and out of Tennessee,

and, on such cars, passing interstate, defendant in error has, in every year, received passengers whose trips only extended from one station in Tennessee to another station in Tennessee.

From 1887 to 1893, plaintiff had agents in Nashville, Chattanooga and Memphis, whose duties were to see that cars were cleaned, that fresh linen was provided, that the porters and conductors were in attendance and that the cars were attached to the proper train.

By a stipulation or statement signed by counsel for both sides, (pr. rec. 28 & 29) it appears that there was some question as to whether the two cars between Nashville and Memphis were, during part of 1887, run back and forward between those places without passing out of the state on their regular runs, and also some discussion with representatives of the state about a compromise in regard thereto.

The court made a special finding on this point as follows (pr. rec. 51):

"5. The sleeping cars were operated during a portion of the year 1887 between Nashville and Memphis, Tennessee, which during that time, though used constantly between said points, did not pass beyond the limits of Tennessee. It was agreed that, without either party waiving any right the plaintiff's claim in No. 2867 should be abated $1,234.00."

In its opinion the court allowed to the comptroller the $1,234 referred to in the fifth special finding, and said that inasmuch as it did not appear that there was a changed condition in 1888, it would make the same allowance for 1888. In other words, it rejected from the claim for reimbursement, all taxes paid in connection with cars sufficient to fill the line between Nashville and Memphis, and gave judgment only for the tax collected by the state on ac-

count of cars running between Nashville and Atlanta, and on account of the proportion of business done in Tennessee on all other interstate cars.

We think it clear, from the record, that defendant in error operated no cars local to the state of Tennessee. But as the circuit court held that the entire tax for 1887 and 1888 levied on account of cars running between Memphis and Nashville could not be recovered, and as we have taken no cross-appeal, all question concerning those cars and that run are eliminated from the case.

By the act of 1887, the state of Tennessee declared the running of sleeping cars in Tennessee a privilege and imposed a tax "on each car $500 per annum." This attempt at taxation is identical with that considered in the case of *Pickard* vs. *Pullman Co.*, 117 U. S., 34. The act considered in that case declared the running of sleeping cars a privilege and imposed a tax of $50 on each car.

The tax act of 1877 involved in the *Pickard* case, and the tax act of 1887 involved in the case at bar, may properly be shown as follows:

Act of 1877.

"That the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege, and the companies * * * * * * * shall be required to pay to the Comptroller by the first day of July following fifty dollars ($50) for each and every of said cars or coaches

Act of 1887.

"That the rate of taxation on the following privileges shall be as follows:

Sleeping car companies—Each company doing business in the state, on each car per annum, five hundred dollars ($500)."

Sec. 8 of the same act is as follows:

"Be it further enacted that any and all parties, firms or corporations exer-

used or as run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid the Comptroller shall enforce the payment of the same by distress warrant".

cising any of the foregoing privileges must pay the taxes as set forth in the act for the exercise of such privilege, *whether they make a business of it or not*".

In the *Pickard* case the comptroller of the state levied a tax of $50 upon every one of the Pullman Co.'s cars that ran through the state. This Court held the tax unconstitutional because it was a regulation of interstate commerce. The opinion was filed in 1886, and thereupon Tennessee at the next meeting of its legislature passed the act of 1887, now before the Court. The tax levied is identical with the one considered in the *Pickard* case, except that the amount is raised from $50 to $500 per car. By reference to what defendant did under the act of 1887, we find its object. This Court stopped the levy of $50 on each car, and thereupon the comptroller thought he would have the tax raised to $500 per car and levy it only against certain cars which he claimed were running locally in Tennessee.

The Circuit Court in deciding the case at bar considered the similarity of these two statutes and said (pr. rec. 53):

"The language of this statute is undistinguishable from the revenue act of 1887 [1877], section 6, except that the privilege tax imposed by the latter act was $50.00 per annum on every sleeping car or coach, while the privilege tax under the act now in question is $500.00 on each car per annum. The act of 1887 [1877], section 6, was under consideration by Chancellor Cooper in 3 Tenn. Chancery, 587, and was construed as applying to interstate commerce and was held to be valid, and the learned chancellor's judgment was affirmed upon appeal to the supreme court of the State, that court apparently accepting not only his conclusions but the reasoning by which those conclusions were reached.

"In *Pickard* vs. *Pullman Southern Car Company*, 117 U. S. 34, the Supreme Court of the United States, on writ of error to the circuit court of the United States for the middle district of Tennessee, reached a different conclusion and decided the question otherwise; and, in the closing paragraph of the opinion, said:

"'The question involved in this case was before the court of chancery of Tennessee in *Pullman Southern Car Company* vs. *Gaines*, 3 Tenn. Chancery, 587, on the same facts, as to the privilege tax for 1887 [1877]. That court held (and it is stated that the supreme court of Tennessee, on appeal, affirmed its ruling), that this privilege tax, as to such of the cars as passed and repassed through the State, and did not abide in it, was not amenable to the objection that it interfered with interstate commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property, or by an excise on its use; and that the tax in this case was not directly on the object of commerce or directly aimed at commerce. We have given to the views set forth by the Tennessee chancery court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion.'

"It must therefore be regarded as a proper construction of these revenue acts, the language of which has just been quoted, that they do apply to interstate commerce, and this construction is the one adopted both by the State supreme court, in the *Gaines* case, following Chancellor Cooper, and by the Supreme Court of the United States in the *Pickard* case. The supreme court of the State decided that the act, construed as applicable to interstate commerce, was valid, while the Supreme Court of the United States held that the statute as thus construed was invalid, and it was only in regard to the validity of the statute that the views of the two courts were divergent."

The act of 1887, however, makes no distinction between local and through cars. It is exactly the same as the one involved in the *Pickard* case. The comptroller had not the power to change the object of the act or to render it constitutional by deciding that he would only enforce it against

certain cars. The act requires the levy of the tax of $500 on each car run in Tennessee, and it is not for the comptroller or any other executive officer to say that he will remit the major effect of the statute and levy it only upon the cars that he claims operate locally in Tennessee. It is so plain as not to call for or allow construction by him. If the act as passed is unconstitutional, no change or limitation of the terms, imposed by an executive officer, can turn it into a constitutional act.

The tax imposed by the comptroller is for two cars running between Nashville and Memphis, for two years; two cars running between Nashville and Chattanooga, for two years; and an arbitrary fixing of one car in each year as the proportion of local business done on interstate cars for two years. Why the comptroller stopped at that point and made this modification of the statute or on what principle he based it, is hard to see. Even if cars had run locally between Memphis and Nashville, why did he not stop with those cars? He also assesses two cars for two years between Nashville and Chattanooga. It is conceded that no cars ran locally between those places, the cars running on to Atlanta. Why did he include them and not include the cars running from Nashville to Louisville? He only taxed one car on account of interstate business. Why did he not tax two cars or tax one half of all the cars running, which would be taxing about 50 more? Perhaps the best refutation of this action of the comptroller is to be found in the brief filed by the attorney general of Tennessee in this Court on the hearing of the equity cases we have already mentioned, which involved these same taxes (139 U. S. 658). On page 20 of that brief the attorney general states his proposition thus:

"The cars employed in a mixed interstate and internal business are likewise taxable and embraced by said statute."

After discussing this proposition through several pages, he says (p. 31 *Ibid*):

"The suggestion that cars must be treated as being engaged in interstate business because they are run on lines of railway that reach beyond the state, needs only to be mentioned."

"The conclusion on this point is that the Pullman Co. is liable for taxes on both of the classes of cars named".

It hardly requires argument to show that the comptroller has no power to vary the statute, to limit its operation or to extend it. The attorney general in the brief referred to, so states, and he insists, disregarding the *Pickard* case, that all the cars, interstate and others, must pay this tax. Taking this as true, we have a case absolutely identical with the *Pickard* case, and we can do nothing else than refer to that case, both as an argument and adjudication against the validity of the tax levied under the law of 1887.

In *Leloup vs. Mobile*, 127 U. S., 647, the Court said:

"But it is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. *But that fact does not remove the difficulty.* The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, *if not already taxed in some other way, may be* subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Sec. 8 of the Tennessee revenue act of 1887 is as follows:

"Sec. 8. BE IT FURTHER ENACTED, That any and all parties, firms or corporations exercising any of the foregoing privileges *must pay the tax* as set forth in this

act for the exercise of such privilege, *whether they make a business of it or not.*"

In *Lyng vs. Michigan*, 135 U. S., 166, the Court said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or *on the occupation or business of carrying it on*, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *Leloup vs. Mobile*, 127 U. S., 640, 648, and cases cited."

An argument is made on behalf of the state that the language of the act of 1887, although substantially the same as that of 1877, ought now to be limited so as to preserve its validity, and several cases are cited in support of that contention as being cases where the court limited the general words in order to preserve the constitutionality of an act, but the cases do not apply.

In *Pacific Express* against *Seibert*, 142 U. S. 350, the tax was levied only upon the receipts from business done within the state and, therefore, there was no need to construe a doubtful act. The act was not doubtful. The tax was limited to *intra* state receipts. The act required the agent to make a "report showing the entire receipts for business done within this state."

In *Maine* against *Grand Trunk Ry.*, 142 U. S. 217, nothing was left to construction. The statute provided for a tax on gross receipts and expressly stated that the average gross receipts should be ascertained and not multiplied by the number of miles operated within the state.

In *Osborne* against *Florida*, the revenue act before it came before the Federal court had been construed by the State Supreme Court to relate only to local or domestic business.

But even if the statute had limited the tax to cars used only within the state, still the judgment under consideration would be good. The circuit court gave judgment only for taxes exacted on account of cars running between Nashville and Atlanta, and on account of what is styled in the bill rendered by the comptroller, "One other car equivalent on business done on all interstate cars in 1887", and a like amount for the succeeding year. Therefore, according to the undisputed facts as found by the special findings, the taxes covered by the judgment are those levied upon the cars referred to, which were engaged in interstate commerce.

In determining the validity of a statute, it is fair and proper to consider its purpose and effect. The act of 1877 imposed a tax of fifty dollars per car and it was levied on about fifty or sixty cars, as shown by the *Pickard case*. When that act was held unconstitutional, the legislature, at its next session, passed the act of 1887, raising the tax to $500 per car, and the comptroller assessed that amount against five cars per annum. When the act of 1887 was declared unconstitutional by Judges Jackson and Key, then the legislature tried another way of taxing the interstate business by the act of 1889, imposing a tax of $3,000 a year upon the company. Is there not plainly inferable from this an attempted evasion of the decision of the court and an attempt to impose the whole tax that had been declared unconstitutional, on a few cars?

In *Morgan* vs. *Louisiana*, 118 U. S., 455, the Court said (p. 462):

"When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose".

We therefore respectfully submit that the validity of the tax levied under the law of 1887, is already settled by the case of *Pickard* vs. *Pullman Co.*, and plaintiff is entitled to judgment for these taxes, with interest.

When the comptroller was attempting to collect the taxes involved in the first two cases, defendant in error filed in this court a bill to restrain the collection of such taxes. The application for an injunction was made to Judge Key and an injunction was granted by him. That equity case came on for hearing before Judges Jackson and Key, and the prayer of the bill was granted and the injunction made perpetual. It is to their opinion that the opinion in the case at bar refers. The equity case was then taken to this Court and the decree was here reversed on the ground that there was a remedy at law and that therefore there was no jurisdiction in equity. 139 U. S., 658.

There is nothing in this opinion, however, that questions the decision of Judges Jackson and Key so far as the merits are concerned.

II.

THE REVENUE ACTS OF 1889 AND 1891.

These acts provide for a privilege tax of $3,000 per annum. Under the act of 1889 taxes were collected for the years 1889, 1890 and 1891, and under the act of 1891, for the year 1892, the rate being $3,000 per annum, and the amount collected from defendant in error, including a considerable amount of penalties and interest.

The two acts are substantially identical and the act of 1889 is as follows:

"Sec. 4. BE IT FURTHER ENACTED, That the rate of taxa-

tion on the following privileges shall be as follows (per annum):

* * * * *

Sec. 5. BE IT FURTHER ENACTED, That the following corporations shall pay directly to the comptroller's office the following taxes:

* * * * *

SLEEPING CAR COMPANIES.

(In lieu of all other taxes except *ad valorem* tax.)

Each company doing business in this state, for one or more passengers taken up at a point in this state and delivered at another point in this state, and transported wholly within this state, per annum, $3,000.

Sec. 8. BE IT FURTHER ENACTED, That any and all parties, firms or corporations exercising any of the foregoing privileges *must pay the tax* as set forth in this act for the exercise of such privileges, *whether they make a business of it or not.*"

The reasoning contained in the opinion of the circuit court on this act (pr. rec. 56, 58) is a strong argument in favor of our position, and to it we respectfully call the attention of the court. The rulings of Judges Jackson and Key, referred to in the opinion, were made in connection with these same taxes, as before stated.

It is clear that plaintiff operates no cars local to Tennessee and that whenever it accommodates a passenger locally in the state, it is but a part of or adjunct to its interstate business done under contracts that call for interstate business.

In the *Pickard* case the court held the tax void because it was an interference with interstate commerce. In the statement of facts we find the following:

"The same cars also *transported passengers from points in Tennessee to other points in that State* whenever they properly applied for such transportation, but the number of such passengers *bore an inconsiderable proportion to the other passengers* transported in those cars; that those cars

ran into, out of or across Tennessee, making such stops as the trains to which they were attached made." (p. 41.)

In the opinion it is said:

"The plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege." (p. 46.)

This act covers interstate commerce and is therefore invalid. If plaintiff only operated one line of sleeping cars through Tennessee, for instance, the Illinois Central line running from Chicago to New Orleans, and a single passenger got on a sleeping car at Martin, Tennessee, and got off at Jackson, Tennessee, then under this act it would have to pay this privilege tax of $3,000. As plaintiff operates certain interstate lines of sleeping cars, as for instance, on the Illinois Central Railroad, it can not engage in that interstate commerce and cross the state of Tennessee without rendering itself subject to this $3,000 privilege tax. It sustains such a relation to the public that, while not a common carrier or an innkeeper, yet it is bound to receive and furnish its accommodations to all those who properly present themselves. The law of the land, the common law of Tennessee, makes it obligatory upon this company, while crossing the state in going from Chicago to New Orleans, to receive passengers at Martin, Tennessee, and allow them to alight at Jackson, Tennessee, and, that being done, Tennessee levies a privilege tax on so doing, and, if the tax is valid, it can be of any amount the state deems best.

The Pullman Company is bound to afford sleeping car accommodations to any person who properly applies therefor.

In *Nevin* v. *Pullman Co.*, 106 Ill., 222, where defendant in error demurred to a declaration which alleged that it had refused to receive a passenger who properly presented

himself and offered to pay for sleeping car accommodations, the court held that the company must receive such passenger. In so holding the court, quoting from Chitty, said (pp. 228, 229):

"There are, however, some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may, therefore, be sued in case, as for a breach of duty, *in refusing to exercise their callings.*"

"It becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public."

Mentioning the duties laid upon a railroad company to serve the public alike, the court said (pp. 230-231):

"In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same?"

"Indeed, the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public?"

"If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the com-

pany is bound to furnish it, provided it has a vacant one at its disposal."

In *Elliott on Railroads*, section 1617, it is said of sleeping car companies:

"That they are under a duty to serve the public impartially and to exercise reasonable care to furnish the required service. There must be some public duty otherwise such public carriers as railroad companies would have no right to haul cars of sleeping-car companies as parts of regular railway passenger trains."

The case of *Attorney General* v. *London & N. W. Ry. Co.*, 6 Q. B. Div. 216, is commented on and quoted at length with approval, by this court in *Pickard* v. *Pullman Co.*, 117 U. S. on pages 46 and 47. It is there held that sleeping car accommodations are of as public a nature as is the carriage, and that the charges for carriage and for sleeping accommodations, are of the same character and must substantially be considered as one charge, thus putting the duty to furnish sleeping accommodations substantially on the same basis as the duty to furnish transportation.

This court quotes with approval the language of *Lord* COLERIDGE in saying:

"We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. The charge, though written on a separate ticket, is, in our opinion, part of the charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of a passenger, received and charged for such conveyance."

Therefore there lies upon the Pullman Company a duty to furnish its accommodations to all who properly apply therefor, and it cannot, on trains running through Tennessee, and stopping at different places within that state, re-

fuse to receive as passengers all who properly apply therefor, although they are only going to spend one night on the car in traveling from one point to another within the state.

Plaintiff in error is engaged in such a business that it is impossible to carry on the interstate commerce in which it is engaged, without also, as incidental thereto, accepting passengers from place to place within the state.

We submit it would not be competent for the Pullman Company, on trains running from Chicago to Florida, to close the doors of its cars in Tennessee and refuse to open them until the car passed out of the state.

The statute of Tennessee, relied upon by plaintiff in error, which abrogates the duties laid upon common carriers, innkeepers and some others of receiving all proper persons who present themselves for carriage, &c., does not apply to defendant in error. As this statute was passed to enable common carriers, &c., to discriminate against colored people, its constitutionality is doubtful. It is certainly a statute in derogation of the common law and must be strictly construed. It must not be extended beyond its exact terms. The Pullman Co. is not a common carrier nor an innkeeper and does not follow any of the avocations mentioned in that statute. Sleeping car companies or their particular avocations are not, in terms, mentioned in the act.

In *Pullman Co.* v. *Smith*, 73 Ill., 360, the Court said (p. 365):

"The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company."

The same doctrine has been held in many other cases, state and federal, which are collected in Elliott on Railroads, sec. 1616, *et seq.* The same doctrine is laid down in *P. Co.* v. *Gavin*, 93 Tenn., 53.

It will thus be seen that this act of Tennessee excusing certain parties from the operation of the common law rule requiring them to treat the public alike, does not apply to defendant in error.

We submit that as the laws of Tennessee compel defendant in error to accept local passengers even if it is only engaged in and only wishes to be engaged in interstate business and then imposes a tax upon that business which may be prohibitive, the revenue act imposing such tax is unconstitutional.

The general character of the business done by defendant in error can not be questioned, and in that connection we wish to call the attention of the Court to one or two extracts from the case of *Pickard* v. *Pullman Co.*, 117 U. S., 34. In the statement of the case (p. 41) it is said:

"The same cars also transported passengers from points in Tennessee to other points in that State whenever they properly applied for such transportation, but the number of such passengers bore an inconsiderable proportion to the other passengers transported in those cars; that those cars ran into, out of or across Tennessee, making such stops as the trains to which they were attached made." (p. 41.)

On page 46 the Court said:

"The plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

If then, in accordance with the last citation, defendant in error carried on no business within the State in the sense in which the carrying on of business in the State is taxable

by way of license or privilege, surely this revenue act must be unconstitutional, for it applies and was meant to apply to defendant in error whether it operated cars locally within the State or not.

In *Pullman Co.* v. *Pennsylvania*, 141 U. S., 25, the Court held valid a tax upon a certain portion of capital stock *because* it was in effect a tax upon property, but in the reasoning of that case throughout it is clear that there was no intention to modify in any way the *Pickard* case, and the case is in fact an authority that the business of this company is not subject to a privilege tax.

In *Adams Express Co.* v. *Ohio*, 165 U. S., 220, in speaking of the case of *Pullman Co.* v. *Pennsylvania*, the court said (p. 221):

"The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that *the whole property of the company might be regarded as a unit plant, with a unit value*, a *proportionate* part of which value might be reached by the state authorities *on the basis indicated.*"

This is a strong declaration that the business of the company is a unit, that any local business in a state is simply incidental to the general business and cannot be separated therefrom, and, upon the theory stated, the tax of $3,000 a year for accommodating a single passenger, can be construed as nothing but a burden upon that "unit" of business, and therefore an interference with interstate commerce. A tax ascertained and graduated according to the principles announced in the two cases just cited, would, of course, be valid. But an attempt to fix a heavy tax upon interstate business through the medium of a single passen-

ger accommodated locally, is thoroughly antagonistic to what this court must have had in mind in writing the opinion from which the last quotation is made. And in support of this suggestion, we quote further from the case last cited the following extract:

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the State, nor from points within the State to points in other States, nor from points in other States to points within the State. It purports to provide for a tax upon *property* within the State of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other *property* within the jurisdiction of Ohio. This proposition is too well settled to need argument." (p. 225.)

In *Adams Express Company* v. *Ohio*, 166 U. S., the court said (page 218):

"Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever named called, which is in effect a tax for the privilege of transacting such commerce."

In the *Pickard* case, especially on pp. 46 and 47, the Court discussed fully the relation of defendant in error to the act of transportation and just what the defendant in error does in the operation of its cars upon a railroad. It is there held that the car is a vehicle of transit and practically belongs to the railroad; that the service rendered the passenger is a single unit covering both carriage and accommodation and that in everything connected with carriage, the car must be construed as a vehicle of the railroad company.

Inasmuch as it has been repeatedly held that state legislation which *may* operate as a burden on or interfere with

interstate commerce is obnoxious to the federal constitution, and inasmuch as this revenue act, joined to the duty imposed by law to accept passengers whenever they offer themselves, would act as such regulation of interstate commerce, it is clear that the act must be unconstitutional.

In *State Freight Tax* case, 15 Wall., it is said on page 277:

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State."

In *Leloup* v. *Port of Mobile*, 127 U. S., 640, it is said, on page 647:

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination."

The attention of the Court is respectfully called to the other parts of the decision in this case and also to the same doctrine laid down in the cases of

Telegraph Co. v. *Alabama*, 132 U. S., 472, 477.

Lyng v. *Michigan*, 135 U. S., 166.

The theory of the state of Tennessee differs from the principles above laid down. This is readily seen by referring to page 12 of the brief for plaintiff in error, where it is distinctly stated that such a tax as this must be borne by the interstate business if the local business will not support it, and that to that extent it may be a slight burden upon interstate business. The same doctrine is laid down at the foot of page 14 of the same brief.

In several cases this court had held there was an im-

portant distinction between a tax upon property and a tax upon the privilege of doing business.

In *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, a privilege tax was sustained because it was a tax imposed,

"*In lieu of all others*, as a privilege tax, and *its amount is graduated according to the amount and value of the property* measured by miles. It is to be noticed that *it is in lieu of all other taxes*, state, county, municipal. * * *

This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent determined by reference to the amount and value of the property" (pp. 697-8).

The court then said that the tax was thereby brought within the rule of the property tax cases and was not really a privilege tax. On page 696 the Court said:

"But *property* in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation *on account of its property* within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State*, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

But this tax is expressly made a privilege tax and the act provides that it shall be in lieu of other taxes "except *ad valorem* tax," thereby expressly saying that it is not a property tax or intended to be in any way gauged by the value of the property.

To sustain a tax levied upon both kinds of traffic there must be a possibility of separating the two and levying a fair tax upon the intra-state traffic. Such intra-state traffic

must be in itself a basis or reason for the tax. It is a violation of the constitution for a state to tax anything because of its relation to interstate commerce.

If the interstate business and the local business upon which only the tax could be sustained, are necessarily so mixed as to preclude separation, a tax thereon is invalid.

Ratterman v. *Western Union T. Co.*, 127 U. S., 411.

In *State Freight Tax case*, 15 Wall., it is said on page 277:

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State."

The fact that the legislature sought to make the license tax depend upon the receiving on the cars an intra-state passenger (which is a necessary incident to the interstate business) cannot save the tax or make it valid. In *Crutcher* v. *Kentucky*, 141 U. S., 47, the court, in holding a license tax invalid, said (p. 59):

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. * * * These regulations are clearly a burden and a restriction upon that commerce. *Whether intended as such or not they operate as such.* But taxes or license fees *in good faith* imposed exclusively on express business carried on wholly within the State would be open to no such objection."

The case of *Osborne* v. *Florida*, 164 U. S., 650, has been cited in support of this tax, but that case differs radically

from the case at bar. In that case the business involved was that of an express company. It is said that the express company could engage in interstate business only, and then the act would not apply to it. Moreover, the supreme court of Florida had passed upon the revenue act there in question and had given it a construction which this Court accepted as binding. By the construction so given, the tax was directed against local business only, and the express company could have engaged in interstate business alone without subjecting itself to the tax. But defendant in error is engaged in an interstate business that necessarily involves some local business. We have not in the case at bar any decision of the supreme court of Tennessee that defendant in error can in any way evade the necessity of paying this license tax.

The main idea of *Osborne* v. *Florida* is contained in that part thereof which, speaking of the express company, says (p. 655):

"It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state."

In the present case the plaintiff in error could not decline local business and therefore the principle of *Osborne* v. *Florida* does not apply.

In *Osborne* v. *Florida* it is said that if the Florida statute applied to interstate business it would be void. The opinion does not criticise the case of *Crutcher* v. *Kentucky*, 141 U. S., 47, but distinguishes it. It does not overrule any of the cases on which we rely.

While the Florida Supreme Court in the *Osborne* case

had decided that the act there under consideration did not apply to interstate business and that point formed the basis of the decision of this court, in the case at bar, we have, according to the opinion in the *Pickard* case, the decision of the Tennessee Supreme Court that the act of 1877, substantially the same as the act of 1887, did apply and was intended to apply to all cars whether used in interstate commerce or not.

In *New York* v. *Roberts,* 171 U. S., 658, this question of taxation was considered. The last paragraph on p. 664 calls attention to the very decided difference there is between corporations exercising public duties engaged in interstate commerce and the taxation that may be imposed upon private corporations. The language referred to makes it clear that the Court could have had no intention of changing its earlier decisions in regard to the taxation of interstate commerce. The case of *Osborne* v. *Florida* is not mentioned and we think that this case may properly be referred to as establishing and affirming the different decisions upon which we rest our case.

Among other late decisions to which we particularly call the attention of the Court as reaffirming the earlier decisions in regard to the freedom from taxation that must be given to interstate commerce and everything connected therewith we cite,

Vance v. *Vandercook,* 170 U. S., 438.
American Refrigerator Co. v. *Hall,* 174 U. S., 70, 77.
Austin v. *Tennessee,* 179 U. S., 343, 344, 349, 375, 376.

That the taxes involved in this case are aimed, not at local business but at interstate commerce, is fully and ably

shown by the opinion of the circuit court in this case (pr. rec. 56 to 58). The argument of that opinion is clear and convincing. These taxes are gauged by interstate business done, and have no relation to local business. If intended as a tax upon or privilege for, local business, it would have had some other measure, some other criterion than simply furnishing accommodations to a single passenger. If it were a tax of two per cent. or three per cent. upon the gross receipts from the local business, we would have no defense to it. It is, however, but a continuation of the old attempt of this state to levy a tax of about $3,000 a year upon the business of the Pullman Company, both interstate and local. It constitutes an actual burden upon interstate commerce. If the principal of it is allowed it can be used to entirely stop the interstate commerce in which defendant is engaged.

But this provision of the license act, seeking to make the business liable to a heavy tax if only a single passenger tenders fare for inter-state accommodation, is but a subterfuge to evade the interstate commerce clause of the Constitution.

In *Crutcher* v. *Kentucky*, 141 U. S., 47, it is said (p. 58):

"It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *Austin* v. *Tennessee*, 179 U. S., 343, the court said:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as

practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (p. 350).

"We endorse fully what was said by this court in *Mugler* v. *Kansas*, 123 U. S., 623, 661: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution'" (p. 344).

In *Morgan* v. *Louisiana*, 118 U. S., 462, the Court said:

"When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose."

In whatever language a statute may be framed, its purpose and its validity under the interstate commerce clause of the federal constitution must be determined by its natural and reasonable effect.

Henderson v. *New York*, 92 U. S., 259, 268.

The test in such a case is upon what does the burden really rest? The tax is not valid because laid upon local and domestic as well as interstate traffic.

Case of the State Freight Tax, 15 Wall., 232, 272.

Counsel for plaintiff in error repeatedly urge that such tax as the present one ought to be upheld because of the protection defendant in error receives in Tennessee. It must be remembered that the license act expressly reserves the right to add further taxes *ad valorem*. Moreover, a state is not entitled to impose a tax on account of the protection

it accords to the instrumentalities of interstate commerce. As between different countries it might be so, as between states bound by the same federal constitution, it is not so. There is a certain reciprocity necessary between the states. The relations of the different states to each other under the federal constitution are such that a citizen of one state has a right to demand protection of the laws of a neighboring state while in it. Business and freight can be transported across a state without stopping and it would not be seriously contended that it could be taxed. Yet it would be protected during such transit. The protection afforded to the citizens and property of one state while passing through another may not be evenly balanced for any one month, but will be in the long run, and whether it is or not the federal constituion contemplates that there shall be reciprocity in the protection afforded by one state to another both over citizens and property. The argument is therefore fallacious that a state acquires a right to tax either a person or his property simply because they pass through that state and are temporarily under the protection of its laws.

There is no distinction in principle between persons and property. If there is reciprocity between the States in the protection of each other's citizens, there is also in regard to property. If the intercourse between States is that of wholly independent nations, the claim of right to tax may be good, but it should be allowed equally on persons and property. If the Constitution of the United States has abolished foreign lines between the States and given reciprocal rights to the citizens of the States, those rights must apply to their property also.

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